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13 **IN THE UNITED STATES DISTRICT COURT**  
14 **DISTRICT OF ARIZONA**

15 A.D., C.C., L.G., and C.R. by CAROL  
16 COGHLAN CARTER, and DR. RONALD  
17 FEDERICI, their next friends;  
18 S.H. and J.H., a married couple;  
19 M.C. and K.C., a married couple;  
20 K.R. and P.R., a married couple;  
21 for themselves and on behalf of a class of  
22 similarly-situated individuals,

23 Plaintiffs,

24 v.

25 KEVIN WASHBURN, in his official  
26 capacity as Assistant Secretary of INDIAN  
27 AFFAIRS, BUREAU OF INDIAN  
28 AFFAIRS; SALLY JEWELL, in her official  
capacity as Secretary of the Interior, U.S.  
DEPARTMENT OF THE INTERIOR;  
GREGORY A. McKAY, in his official  
capacity as Director of the ARIZONA  
DEPARTMENT OF CHILD SAFETY,

No. 2:15-CV-01259- PHX-NVW

**FEDERAL DEFENDANTS’  
MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS FIRST  
AMENDED COMPLAINT**

(Assigned to The Honorable Neil V.  
Wake)

Defendants.

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Pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, Federal Defendants renew their Motion to Dismiss and seek dismissal of Plaintiffs' First Amended Complaint in its entirety, incorporating by reference the entirety of Federal Defendants' prior briefing in support of their initial motion to dismiss.<sup>1</sup>

### **INTRODUCTION**

Plaintiffs' First Amended Complaint does nothing to repair their fatally flawed case. Despite inflammatory rhetoric, Plaintiffs cannot overcome two basic defects in their theory of this case. First, the Indian Child Welfare Act ("ICWA") is not a statute that disadvantages Indian children. Far from putting Indian children in a "penalty box," the statute actually provides crucial safeguards to *protect* Indian children and their connections to their biological families. *See* 25 U.S.C. § 1902 (ICWA designed to "protect the best interests of the Indian child and to promote the stability and security of Indian tribes and families"). For example, Plaintiffs characterize ICWA's active efforts provision, *id.* § 1912(d), as a "penalty" while most people would think efforts to help a child's biological family remain intact are beneficial to the child. Second, the premise of Plaintiffs' entire complaint is wrong: ICWA is not a race-based statute. Instead, the statute is squarely grounded on the political connection that Indian children have with their tribes. Ironically, Plaintiffs' repeated suggestions that Indian children are harmed by ICWA's protections of their relationship with their parents, extended family, and

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<sup>1</sup> *See* ECF No. 68 (Federal Defendants' Motion to Dismiss and Memorandum of Points and Authorities); ECF No. 96 (Federal Defendants' Reply Memorandum in Support of Their Motion to Dismiss). Federal Defendants incorporate their briefing in accord with this Court's instructions (ECF Nos. 172 at 3). Because Plaintiffs have only added parties, allegations, and one new claim, but not dropped anything, prior briefing relating to Plaintiffs' complaint remains relevant in its entirety. However, the paragraph numbering has changed in the amended complaint such that citations to the complaint in the original briefing are no longer accurate. If the Court desires, the Federal Defendants can resubmit the prior briefing with updated citations. In any event, Plaintiffs' proposed redline complaint (ECF No. 150-2) has both the original numbering of the complaint (in stricken form) and the amended numbering.

1 tribes smacks of exactly the bias that Congress passed ICWA to combat.<sup>2</sup> In order to  
2 protect Indian children, ICWA establishes pro-child and pro-family federal standards.  
3 As leading practitioners in the field have explained, ICWA's protections are the "gold  
4 standard" for child welfare practice. ECF No. 84 (*amicus* brief of thirteen national child  
5 welfare organizations).

6 Plaintiffs lack of standing stems, in part, from the fact that ICWA is a beneficial  
7 – rather than harmful – statute. And, as discussed below and in the Federal Defendants'  
8 prior briefing, Plaintiffs challenge ICWA provisions that largely have not been, nor  
9 necessarily will be, applied to them. Moreover, ICWA leaves significant discretion for  
10 State courts to apply the law to the facts of the particular case before them. Because  
11 Plaintiffs have failed to identify any injury sufficient to confer Article III standing, this  
12 Court does not have subject matter jurisdiction over their claims.

13 Plaintiffs are also fundamentally wrong – and ignore governing Supreme Court  
14 precedent – in their claim that ICWA is a race-based statute. The applicability of  
15 ICWA's beneficial standards turns on the child's tribal membership – not on her race.  
16 If she is a member of a federally recognized tribe, then ICWA applies. If not, then  
17 ICWA can only apply if her parent is a member of a tribe and she is eligible for  
18 membership. Thus, the child's political connection to a federally recognized tribe is  
19 paramount, not her race. The United States has a government-to-government  
20 relationship with these tribes, and ICWA is rationally tied to the need for federal  
21 standards to protect tribal children from unwarranted removal from their families. *See*  
22 *Morton v. Mancari*, 417 U.S. 535 (1974). Thus, since ICWA is not race-based,  
23 Plaintiffs have failed to state a valid equal protection claim. Plaintiffs' remaining  
24 claims are similarly flawed, as discussed in prior briefing. All the arguments raised in  
25

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26 <sup>2</sup> This is not surprising, given that the "next friends" that purport to represent the  
27 children have no relationship with these Indian children, and do not even claim  
28 expertise in ICWA, Indian tribes, or the interests and needs of Indian children more  
generally.

1 that briefing continue to apply with full force to the First Amended Complaint.<sup>3</sup>

2 The First Amended Complaint adds two new child Plaintiffs, L.G. and C.R., two  
3 new foster-care providers, K.R. and P.R., a new next friend, Ronald Federici, and a new  
4 claim targeting the State Defendant. ECF No. 173. None of these additions rescue  
5 Plaintiffs' case but they do point up its weaknesses. In particular, Plaintiffs' new "next  
6 friend," Ronald Federici, has no relationship to these children, much less the  
7 "significant relationship" required for next friend status. Given that ICWA is designed  
8 to protect the interests of Indian children and their relationships with their parents and  
9 extended family, it is not surprising that Plaintiffs' counsel are unable to find any  
10 qualified next friend who is willing to join their challenge to this law.

11 For the reasons discussed here and in prior briefing incorporated by reference,  
12 Plaintiffs' First Amended Complaint should be dismissed for lack of subject matter  
13 jurisdiction and, on the merits, for failure to state a claim.

#### 14 **ARGUMENT**

##### 15 **I. L.G. Lacks Standing and Further Demonstrates that ICWA is not a 16 Race-Based Statute.**

17 *L.G. lacks standing.* According to Plaintiffs' First Amended Complaint, L.G. is a  
18 3.5-year-old child of Indian ancestry who, along with her brother C.R., is in the foster  
19 care of P.R. and K.R. Neither she nor her brother are currently available for adoption,  
20 ECF No. 173 ¶¶ 11, 40, 42, presumably because parental rights have not been  
21 terminated. Although her father sought membership with the Pascua Yaqui Tribe, it  
22 was not granted, *id.* ¶ 35, and consequently L.G. "is not an 'Indian child' within the  
23 meaning of ICWA," *id.* ¶ 40. ICWA, therefore, does not apply to L.G.

24 Plaintiffs allege that L.G. is injured by a statute that, they concede, does not

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25 <sup>3</sup> Federal Defendants' prior briefing in support of dismissal should serve as the Court's  
26 starting point. In accord with this Court's instruction, the present brief is limited to  
27 supplementing prior briefing by addressing the additions to Plaintiffs' original  
28 complaint. Accordingly, the relevant statutory background and standard of review will  
not be repeated here.

1 apply to her by claiming that “[b]ut for ICWA . . . L.G. and C.R. would be placed  
 2 together due to their bonding and attachment, pursuant to state law.” *Id.* ¶ 41. But this  
 3 also does not establish standing because L.G. and C.R. *are already placed together* in  
 4 foster care, and they are not currently the subject of any adoption petition. *Id.* ¶ 42.  
 5 Predictions about the outcomes of future adoption proceedings are entirely speculative  
 6 and an “extended chain of highly speculative contingencies” leading to potential future  
 7 injury provides no basis for standing.<sup>4</sup> *Nelsen v. King Cty.*, 895 F.2d 1248, 1252 (9th  
 8 Cir. 1990).

9 Similarly, Plaintiffs unelaborated assertion that “[b]ut for ICWA” L.G. “would  
 10 likely have been cleared for adoption [already]” does not suffice to show the requisite  
 11 injury to challenge the array of ICWA provisions identified in Plaintiffs’ complaint.  
 12 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“Nor does a complaint suffice if it tenders  
 13 naked assertions devoid of further factual enhancement.”) (internal quotations and  
 14 brackets omitted). Plaintiffs’ argument is based on the remarkable assertion that a child  
 15 is injured by a federal requirement (which Plaintiffs do not allege applies to her) that  
 16 efforts be made to reunite a child with her biological parent before parental rights are  
 17 terminated. The Supreme Court has recognized that a natural parent’s “right to the  
 18 companionship, care, custody, and management of his or her children is an interest far  
 19 more precious than any property right,” and that this right is entitled to certain due

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20 <sup>4</sup> Here is the “chain” (none of which is actually alleged or discussed in the complaint): a  
 21 state court must find that L.G. and C.R. cannot be reunited with their parents, and must  
 22 terminate parental rights; a member of C.R.’s (and possibly L.G.’s) extended family, or  
 23 some other person meeting ICWA’s placement preferences, would have to seek to adopt  
 24 C.R.; that person would also decide not to seek to adopt L.G.; the court would have to  
 25 conclude that there is no good cause to deviate from ICWA’s placement preferences for  
 26 C.R., 25 U.S.C. § 1915(a); and this would have to somehow lead to L.G. being adopted  
 27 by a different family, in spite of a state policy of keeping siblings together. Right now,  
 28 it is pure speculation to say L.G. and C.R. will be available for adoption at all, much  
 less that they will not be adopted by their current foster-care providers (as happened to  
 C.C.), or that they will be split apart – and that either possibility, should it occur, will be  
 the result of ICWA.

1 process protections. *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982). In sharp  
 2 contrast, no such right has been recognized for foster-care providers. *See Smith v. Org.*  
 3 *of Foster Families for Equality and Reform*, 431 U.S. 816 (1977).

4 Moreover, Plaintiffs entirely discount Arizona child welfare law in complaining  
 5 that L.G. has been left to “languish” in foster care. ECF No. 173 ¶ 43. If L.G. (or C.R.)  
 6 is not available for adoption, it is because the State agency has not filed, or the State  
 7 court has not granted, a petition for termination of parental rights under State law, not  
 8 because of ICWA. *See* A.R.S. § 8-533. Further, Plaintiffs conflate ICWA’s placement  
 9 preferences with the termination of parental rights. ECF No. 173 ¶¶ 39, 42. ICWA’s  
 10 placement preferences do not now and may never apply to C.R. and cannot, in any  
 11 event, apply to L.G.<sup>5</sup>

12 Plaintiffs allege that because C.R. is an “Indian child” within the meaning of  
 13 ICWA, his sibling L.G. will in effect be indirectly subject to ICWA as well because  
 14 State law prioritizes placing siblings together. *Id.* ¶¶ 40-42; ECF No. 169 at 4. In fact,  
 15 Arizona law considers many factors in making placements, *see, e.g.*, Ariz. Rev. Stat. 8-  
 16 514, but under any circumstances, their argument here is with Arizona law, not with  
 17 ICWA, which has no application to L.G.<sup>6</sup> Because L.G. is not subject to ICWA, she has  
 18 no standing to bring claims challenging it.

19 *L.G. refutes Plaintiffs’ argument that ICWA is a race-based statute.* L.G.  
 20 demonstrates that ICWA is not race-based in its application. That is so because, as  
 21 Plaintiffs admit, L.G. has “Indian ancestry,” ECF No. 273 ¶ 42, and yet, as Plaintiffs  
 22

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23 <sup>5</sup> Plaintiffs assert that when L.G. is cleared for adoption, they might be hindered from  
 24 adopting her absent a showing of good cause to deviate from ICWA’s adoption  
 25 placement preferences. *Id.* ¶ 42. But, again, L.G. will not be subject to ICWA’s  
 adoption placement preferences.

26 <sup>6</sup> Plaintiffs’ allegations regarding L.G. are conflicting. On the one hand, they assert  
 27 ICWA will split up the siblings, ECF No. 173 ¶ 41, but on the other hand allege that  
 28 because they *will not be split up* as siblings, L.G. is effectively subject to ICWA, *id.* ¶  
 40.



1 also admit, she is an example of a person of such ancestry “not being *herself* subject to  
2 ICWA[],” ECF No. 169 at 4. If ICWA applied based on Indian ancestry, then L.G.  
3 would qualify for its protections. But ICWA does not apply on a racial basis. It applies  
4 to children affiliated with specific political entities – federally recognized Indian tribes –  
5 by virtue of their own membership or their parent’s membership and their eligibility. 25  
6 U.S.C. § 1903(4).

7 Unable to get around the plain language of the statute, Plaintiffs instead argue  
8 that tribal membership is often linked to “biological ancestry.” ECF No. 169 at 10.  
9 But not just anyone of Indian ancestry can belong to any tribe. An individual is eligible  
10 for membership in a particular tribe because of his or her connections to a specific tribe,  
11 not because they fall into a larger racial category. As illustrated by L.G.’s  
12 circumstances, a child can have Indian racial ancestry but lack the requisite connections  
13 with a specific Indian tribe to be eligible for membership in that tribe. *See K.D. v. M.L.*  
14 *(In re Adoption of C.D.)*, 751 N.W.2d 236, 243 (N.D. 2008) (ICWA “requires more than  
15 a showing that the child and the parent have an Indian heritage”); *In the Interest of*  
16 *R.M.W.*, 188 S.W.3d 831, 833 (Texas Ct. App. 2006) (“Indian ‘heritage’ or ‘blood’  
17 provides no evidence that any of the children are Indian children under ICWA”).  
18 Accordingly, Plaintiffs’ equal protection and due process claims fail because they are  
19 premised on the false assumption that ICWA treats a class of people differently on the  
20 basis of race.

21 Finally, Plaintiffs’ assertion (relying on *Korematsu v. United States*, 323 U.S.  
22 214 (1944)) that tribal reliance on ancestry to establish membership criteria is suspect  
23 and subject to strict scrutiny is flatly wrong. ECF No. 169 at 2 n.3. The Supreme Court  
24 has repeatedly recognized that tribal affiliation is a political classification that is not  
25 subject to strict scrutiny, notwithstanding that tribes are necessarily comprised of  
26 descendants of indigenous peoples. *See, e.g., Morton v. Mancari*, 417 U.S. 535 (1974).  
27 Of particular relevance to this case, in *Fisher v. Dist. Court of Sixteenth Judicial Dist. of*  
28

1 *Montana, in & for Rosebud Cty.*, the Supreme Court held that exclusive tribal  
 2 jurisdiction over tribal members in adoption matters is not racial discrimination. 424  
 3 U.S. 382, 390-91 (1976). That is because tribal court jurisdiction over tribal members  
 4 “does not derive from the race of the plaintiff but rather from the quasi-sovereign status  
 5 of the [Tribe] under federal law.” *Id.* That is so, the Court continued, “even if a  
 6 jurisdictional holding occasionally results in denying an Indian plaintiff a forum to  
 7 which a non-Indian has access . . . because it is intended to benefit the class of which he  
 8 is a member by furthering the congressional policy of Indian self-government.” *Id.*

9 Unlike *Korematsu*, *Fisher* concerned facts that make it directly applicable to this  
 10 case: whether denying tribal members access to state courts on the basis of their tribal  
 11 membership amounts to racial discrimination subject to strict scrutiny. *See Fisher*, 424  
 12 U.S. at 384 n.5 (quoting tribal ordinance conferring jurisdiction over “applications for  
 13 adoptions among members of the Northern Cheyenne Tribe”). In that case, the Court  
 14 refused to conflate race with tribal membership and rejected the equal protection  
 15 challenge. Only a year later, in *United States v. Antelope*, the Court reaffirmed *Fisher*  
 16 in concluding that federal jurisdiction over Indians in Indian country did not constitute  
 17 racial discrimination. 430 U.S. 641 (1977). The Court explained that “respondents  
 18 were not subjected to federal criminal jurisdiction because they are of the Indian race  
 19 but because they are enrolled members of the Coeur d’Alene Tribe.” *Id.* at 646. *Fisher*  
 20 and *Antelope* apply here: tribal membership is not a suspect category akin to race and  
 21 subject to strict scrutiny, and therefore a statute like ICWA which applies to tribal  
 22 members is not suspect either.

23 Plaintiffs inevitably will rejoin that the tribal court jurisdiction in *Fisher*  
 24 concerned on-reservation Indians, but the rationale for concluding that tribal authority  
 25 over members is not racially based does not change when that member leaves the  
 26 reservation. There may be limits on tribal jurisdiction over off-reservation members,  
 27 but any such limits do not derive from the notion that a member’s location somehow  
 28

1 transforms an appropriate political relationship into an inappropriate racial  
2 classification.<sup>7</sup>

3 *Fisher* not only firmly rejects Plaintiffs’ notion that Indian status is a racial  
4 category, but also strongly affirms the sovereign interest of tribes in child-custody  
5 matters. In *Fisher*, an Indian child’s custodian was dissatisfied with a tribal-court order  
6 granting temporary custody in the summer to the child’s mother, and sought to adopt the  
7 child in state court. *Id.* at 383. The Supreme Court concluded that “[s]tate-court  
8 jurisdiction plainly would interfere with the powers of self-government conferred upon  
9 the Northern Cheyenne Tribe and exercised through the Tribal Court.” *Id.* at 387.  
10 Similarly, ICWA recognizes and protects this sovereign interest by providing for  
11 exclusive tribal jurisdiction over child-custody proceedings involving an Indian child on  
12 a reservation, *id.* § 1911(a), and concurrent but presumptive tribal jurisdiction over such  
13 matters involving off-reservation children, *id.* § 1911(b). *Fisher* establishes that the  
14 special protections for Indian children in ICWA do not implicate the strict scrutiny  
15 reserved for disparate treatment of suspect classes, and, as discussed in our initial  
16 motion to dismiss briefing, ICWA’s provisions easily pass rational basis scrutiny.

## 17 **II. C.R. Lacks Standing and Demonstrates that Plaintiffs’ First** 18 **Amendment Claim should be dismissed.**

19 *C.R. lacks standing.* Plaintiff C.R. is L.G.’s brother by a different father, ECF  
20 No. 173 ¶¶ 11-12, and they share a foster-care placement with P.R. and K.R., *id.* ¶ 42.  
21 Like L.G., C.R. is not yet the subject of any adoption proceeding and his parents’ rights  
22 have not yet been terminated. *Id.* ¶¶ 12, 42. Even assuming *arguendo* that it is in  
23 C.R.’s interest to be adopted, rather than maintaining his relationship with his biological

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24 <sup>7</sup> Congress specifically considered and affirmed its authority to protect tribal members  
25 and their membership-eligible children residing off-reservation. H.R. Rep. 95-1386 at  
26 15 (1978) (citing *inter alia* *U.S. v. Holliday*, 70 U.S. 407, 418 (1865) (“The right to  
27 exercise [legislative authority] in reference to any Indian tribe, or any person who is a  
28 member of such tribe, is absolute, without reference to the locality of the traffic, or the  
locality of the tribe, or of the member of the tribe with whom it is carried on.”)).

1 mother, the First Amended Complaint is utterly devoid of any logical connection  
 2 between his unavailability for adoption and ICWA. To be sure, ICWA requires active  
 3 efforts be made to preserve C.R.’s biological family and further requires a showing of  
 4 “evidence beyond a reasonable doubt” before an Indian child’s parents rights can be  
 5 terminated. 25 U.S.C. § 1912(d), (f). But those requirements protect C.R. rather than  
 6 injure him and cannot constitute an injury to C.R. for standing purposes because one  
 7 “cannot presume that a child and his parents are adversaries” in such a proceeding until  
 8 it is determined that parental rights must be terminated. *Santosky*, 455 U.S. at 761.  
 9 This is to say nothing of foster-care providers whose interests “are not implicated” until  
 10 the “*dispositional* stage” of a parental rights termination proceeding which would only  
 11 arise after attempts to prevent a child’s biological family’s breakup had failed. *Id.*  
 12 (emphasis in original).<sup>8</sup>

13 Moreover, if he is made available for adoption, it is entirely speculative whether  
 14 alternative adoptive placements will be put forward and whether the State court will  
 15 choose one of them instead of concluding there is good cause to deviate from ICWA’s  
 16 placement preferences. Finally, it is the height of hubris for Plaintiffs – who clearly  
 17 speak with the voice of the foster-care providers, not the young children co-opted into  
 18 this case – to assume that a child is injured because there is some possibility they may  
 19 not remain with a particular set of foster-care providers, but instead might be reunified  
 20 with their parents, or extended family, or placed in another safe and loving home. This  
 21 is not a sufficient injury on which to base standing.

22 *C.R. demonstrates that Plaintiffs’ First Amendment claim should be dismissed.*  
 23 Plaintiffs allege that ICWA violates the First Amendment by forcing children to  
 24 associate with tribes simply because of their race. ECF No. 173 at ¶ 139. But that  
 25 allegation is disproven by the fact that L.G., though of the Indian “race,” is not forced to

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26 <sup>8</sup> To be clear: the First Amended Complaint provides no information on whether and  
 27 how these provisions have been applied in any proceeding to terminate the rights of  
 28 C.R.’s parents.

1 associate with any tribe by ICWA. C.R. by contrast is alleged to be eligible for  
 2 membership in the Gila River Indian Community and has two parents who are  
 3 themselves members of the Gila River Indian Community. ECF No. 173 ¶ 36.  
 4 Membership in a tribe is a bilateral consensual relationship. *See Means v. Navajo*  
 5 *Nation*, 432 F.3d 924, 934 n. 68 (9th Cir. 2005) (“The authorities suggest that members  
 6 of Indian tribes can renounce their membership.”); *Thompson v. County of Franklin*,  
 7 180 F.R.D. 216, 225 (N.D.N.Y. 1998) (giving effect to individual’s unequivocal  
 8 renunciation of tribal membership). C.R. is an “Indian child” because he was born to  
 9 parents who chose to be and remain members of a federally recognized Indian tribe,  
 10 with its attendant rights and privileges.<sup>9</sup>

11 Plaintiffs resist the notion that membership is consensual for the obvious reason  
 12 that it undermines their effort to conflate race (which is not consensual) with tribal  
 13 membership. To prop their claim, they offer unsupportable allegations, claiming  
 14 without basis that children “are enrolled in the tribes as a result of the mandate of ICWA  
 15 and New Guidelines.” ECF No. 173 ¶ 138. Nothing in either ICWA or the Guidelines  
 16 makes tribal members out of non-members. In fact, an earlier version of ICWA defined  
 17 “Indian” to include any person “eligible for membership in a federally recognized  
 18 tribe.” 123 Cong. Rec. 37223 (Nov. 1977). However, Congress instead ultimately  
 19 chose to narrow that definition to encompass only eligible children who had a parent  
 20

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21 <sup>9</sup> Plaintiffs, purporting to speak on behalf of C.R., object to his association with his tribe  
 22 but, as they elsewhere have pointed out, “children, particularly newborns, are legally  
 23 incapable of consenting” to tribal membership. ECF No. 169 at 11. By the same token,  
 24 C.R. is too young to disavow such membership. All we can say for sure about C.R. is  
 25 that he was born to parents who choose to be enrolled in a tribe. ICWA presumes and  
 26 protects the likelihood that C.R.’s parents would want their child to enjoy the same  
 27 advantages they derived from such membership until the child reaches an age of  
 28 majority and has the capacity to make his own choice on whether to maintain such  
 membership. *See* H.R. Rep. No. 95-1386, at 16-17 (ICWA’s “Indian child” definition  
 protects “Indian children who, because of their minority, cannot make a reasoned  
 decision about their tribal and Indian identity”).

1 who was a tribal member. 25 U.S.C. § 1903(4). That narrowing ensures ICWA  
2 protects family ties to tribes but does not create them.

3 This Court should reject Plaintiffs' unreasonable construction of the Guidelines  
4 (which are not binding in any event, ECF No. 68 at 33-34) as well as Plaintiffs'  
5 implausible and unsupported allegation that "DCS . . . forces children deemed Indian to  
6 associate with and become members of federally-recognized tribes." ECF No. 173 ¶  
7 140. Plaintiffs provide no examples of anybody being forced to become members of  
8 Indian tribes by the State.<sup>10</sup> Here, C.R. is protected by ICWA because his parents have  
9 chosen to be members in the Gila River Indian Community. He is already associated  
10 with that Tribe, and Congress has determined that this association warrants certain  
11 protections.

12 Plaintiffs also characterize as a "forced association" the fact that ICWA protects  
13 tribal jurisdiction over Indian children involved in child-custody proceedings even when  
14 they live off-reservation. ECF No. 173 ¶¶ 139, 141. ICWA requires that, upon the  
15 petition of a parent or the tribe, a foster-care or termination-of-parental-rights  
16 proceeding involving a child domiciled off-reservation be transferred to tribal court  
17 absent good cause to the contrary or the objection of either of the child's parents. 25  
18 U.S.C. § 1911(b). This provision is designed to prevent state courts from unduly  
19 interfering with a tribe's right to exercise jurisdiction over the domestic relations of its  
20 members even off-reservation, while still preserving the right of the parents to select the  
21 most appropriate forum. *See* 25 U.S.C. § 1901(5).

22 The Ninth Circuit has made clear that tribal jurisdiction over members is not

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23  
24 <sup>10</sup> Plaintiffs rely on a provision of the Department's 2015 Guidelines that identifies as a  
25 best practice that State agencies should "take the steps necessary to obtain membership"  
26 for an Indian child who is not yet a tribal member. ECF No. 173 ¶ 140 (citing 80 Fed.  
27 Reg. 10146-02 at 10153, B.4(d)(iii)) (Feb. 25, 2015). But this advice applies only to a  
28 child who is already determined to be an "Indian child." And, it is certainly reasonable  
for a State agency to seek the benefits and services that can accompany tribal  
membership for a child in its custody.

1 territorially confined: “[T]ribal sovereignty is not coterminous with Indian country. . . .  
 2 Rather, tribal sovereignty is manifested primarily over the tribe’s members.” *Native*  
 3 *Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548, 558 n.12 (9th Cir.  
 4 1991) (internal citations omitted). *See also Kaltag Tribal Council v. Jackson*, 344 F.  
 5 App’x 324, 325 (9th Cir. 2009) (same); *Sidney v. Zah*, 718 F.2d 1453, 1456 (9th Cir.  
 6 1983). Along similar lines, the Sixth Circuit in the criminal context concluded the fact  
 7 that tribal criminal court jurisdiction over members off-reservation “is neither surprising  
 8 nor hard to accept given the ‘voluntary character of tribal membership and the  
 9 concomitant right of participation in a tribal government, the authority of which rests on  
 10 consent.’” *Kelsey v. Pope*, 809 F.3d 849, 857 (6th Cir. 2016) (quoting *Duro v. Reina*,  
 11 495 U.S. 676, 694 (1990)). Accordingly, even absent ICWA, tribes have jurisdiction  
 12 over members with regard to domestic matters like child custody. *See Mississippi Band*  
 13 *of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 (1989) (“Tribal jurisdiction over  
 14 Indian child custody proceedings is not a novelty of the ICWA”).

15 Plaintiffs’ complaint is based on the premise that tribal members not living on a  
 16 reservation “have little or no contact or connection with the tribe,” *see* ECF No. 173 ¶  
 17 61, and they thus ask this Court to enjoin the application of ICWA to any “Indian child”  
 18 living off-reservation. Whether one lives on or off a reservation provides no basis to  
 19 ascertain what kind of “ties” one has with one’s tribe for purposes of ICWA’s  
 20 applicability. Indeed some tribes have no reservations and Plaintiffs’ proposed bright  
 21 line rule would harshly deprive those tribes’ members, in their entirety, of ICWA’s  
 22 protections. *See Alaska v. Native Village of Venetie Tribal Gov’t*, 522 U.S. 520, 532  
 23 (1998) (noting Alaska Native Claims Settlement Act revoked “all existing reservations  
 24 in Alaska . . . save one”); *Cent. Council of Tlingit & Haida Indian Tribes of Alaska*,  
 25 2016 WL 1168202 at \*4 (noting because much of Indian country in Alaska has been  
 26 extinguished, Alaskan courts “have had to examine the inherent, non-territorial  
 27 sovereignty of Indian tribes”). ICWA’s legislative history recognized as much, noting  
 28



1 that “[m]any Indian families move back and forth from a reservation dwelling to border  
 2 communities or even to distant communities depending on employment and educational  
 3 opportunities” but that wherever they are, “Indian children are usually culturally and  
 4 tribally terminated by placements to non-Indian homes when they are subject to State  
 5 court systems.” S. Rep. 95-597 at 51 (1977).

6 Moreover, Plaintiffs’ invitation to this Court to ascertain who is sufficiently  
 7 “Indian” to warrant Federal protections puts this Court in the unappealing position of  
 8 making the very kinds of judgments ICWA was meant to forestall:

9 One of the most serious failings of the present system is that Indian  
 10 children are removed from the custody of their natural parents by  
 11 nontribal government authorities who have no basis for intelligently evaluating  
 12 the cultural and social premises underlying Indian home life and childrearing.  
 13 Many of the individuals who decide the fate of our children are at best ignorant  
 14 of our cultural values, and at worst contemptful of the Indian way and convinced  
 that removal, usually to a non-Indian household or institution, can only benefit an  
 Indian child.

15 *Holyfield*, 490 U.S. at 34-35 (quoting 1978 Hearings on ICWA at 191-192). As one  
 16 state court noted, “ICWA was passed, in part, to curtail state authorities from making  
 17 child custody determinations based on misconceptions of Indian family life [and  
 18 evaluating a child’s tribal connections] clearly frustrates this purpose.” *Matter of Baby*  
 19 *Boy C.*, 27 A.D.3d 34, 49 (N.Y. App. Div. 2005); *see also In re Alicia S.*, 65 Cal. App. 4  
 20 th 79, 90, Cal. Rptr. 2d 121, 128 (1998) (“The determination whether an Indian child  
 21 and/or his or her parents have any ‘significant’ ties to Indian culture is, by its very  
 22 nature, a highly subjective one that state courts are ill-equipped to make.”). To be sure,  
 23 Plaintiffs seek a bright line rule, rather than a case-by-case adjudication, of when an  
 24 Indian child is properly subject to ICWA. But their on-reservation/off-reservation  
 25 distinction requires this Court to approve Plaintiffs’ judgment about who is a tribal  
 26 Indian and who is not. This Court should reject such a problematic invitation and defer  
 27 to the will of Congress, supported by the precedent of numerous courts.



1           **III.     K.R. and P.R. Lack Standing.**

2           K.R. and P.R. are foster-care providers who were granted temporary care of L.G.  
3 and C.R. as part of a child-custody proceeding. ECF No. 173 ¶¶ 11-12, 17. K.R. and  
4 P.R. are indistinguishable from the other plaintiff foster-care providers except that  
5 unlike Plaintiffs S.H. and J.H., they do not even have a pending petition for adoption of  
6 the children committed to their temporary care. *Id.* ¶ 15. Their situation mirrors  
7 Plaintiffs M.C. and K.C. in that ICWA cannot be said to apply to any of them in any  
8 respect. Because K.R. and P.R. do not even have a pending adoption petition, any  
9 injury suffered from ICWA in connection with their desire to adopt L.G. and C.R. at  
10 this juncture is purely hypothetical and speculative.

11           **IV.     C.C., M.C., and K.C.’s Claims Against Federal Defendants are Moot**

12           Plaintiffs’ First Amended Complaint maintains the claims asserted by C.C.,  
13 M.C., and K.C. even though M.C. and K.C.’s adoption of C.C. was finalized by the state  
14 court in November, 2015. ECF Doc 173 ¶ 10. Because C.C., M.C. and K.C. are no  
15 longer involved in a child-custody proceeding, they are no longer subject to ICWA and  
16 any claim that may have been premised upon an injury suffered from ICWA is now  
17 moot. *See Bernhardt v. County of Los Angeles*; 279 F.3d 862, 871 (9th Cir. 2002)  
18 (“Where the activities sought to be enjoined already have occurred, and the appellate  
19 courts cannot undo what has already been done, the action is moot and must be  
20 dismissed.”). The only claim arguably maintained by C.C., M.C. and K.C. is Count 7,  
21 which is directed at Defendant McKay. Thus, these plaintiffs no longer have any live  
22 claims before the Court directed at Federal Defendants.

23           **V.     Ronald Federici Lacks Standing as Next Friend**

24           Like Carter, Ronald Federici asserts that he is “next friend” to A.D., C.C., L.G.,  
25 and C.R. However, for the same reasons that Carter is inappropriate as “next friend” to  
26 these children, so too is Federici. If anything, Federici has less of a relationship than  
27 Carter, much less the required “significant relationship,” with these children. Federici is  
28

1 a citizen of the State of Virginia and nothing in the Complaint suggests any relationship  
2 between Federici and the children he purports to represent, who are wholly situated in  
3 the State of Arizona. *Coal. of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153,  
4 1162 (9th Cir. 2002) (explaining the “more attenuated the relationship” between the  
5 proposed next friend and the real party in interest, the less likely the next friend can  
6 know the best interests of the party). Plaintiffs do not allege that Federici has provided  
7 treatment to or neuropsychiatric evaluations of any of the children in this action. ECF  
8 Doc. 173 ¶ 14. Rather, Plaintiffs put forth generally his professional credentials, his  
9 history as an expert witness in other child-custody proceedings,<sup>11</sup> and his work in the  
10 international context, *id.*, which is irrelevant here. Without any relationship, let alone a  
11 significant one, to the Plaintiff children, Federici is unsuitable. As the Ninth Circuit  
12 warned, “however worthy and high minded the motives of ‘next friends’ may be, they  
13 inevitably run the risk of making the actual [party] a pawn to be manipulated on a  
14 chessboard larger than his own case.” *Id.* at 1161 (citing *Lenhard v. Wolff*, 443 U.S.  
15 1306, 1312 (1979)); *see also T.W. by Enk v. Brophy*, 124 F.3d 893, 897 (7th Cir. 1997)  
16 (“[T]he next friend must be an appropriate alter ego for a plaintiff who is not able to  
17 litigate in his own right; . . . persons having only an ideological stake in the child’s case  
18 are never eligible.”). For these reasons, Federici lacks standing as “next friend” to the  
19 children.

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26 <sup>11</sup> The amended complaint does not even allege that Federici has been involved in  
27 proceedings involving ICWA. Moreover, the fact that Federici was an expert witness in  
28 unrelated proceedings does not remedy his lack of relationship with the children here.

**CONCLUSION**

For the forgoing reasons, the Court should dismiss or abstain from hearing Plaintiffs' claims.

RESPECTFULLY SUBMITTED this 22nd day of April, 2016.

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 22, 2016, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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